



HUB International Limited

Joseph F. DeNoyior  
President, Retirement & Private Wealth  
150 N Riverside Plaza, 17<sup>th</sup> floor  
Chicago, Illinois 60606  
jeff.gery@hubinternational.com

hubinternational.com

January 2, 2024

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Attn: Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue NW  
Washington, DC 20210

Office of Exemption Determinations  
Employee Benefits Security Administration  
Attn: D-11712  
U.S. Department of Labor  
200 Constitution Avenue NW, Suite 400  
Washington DC 20210

*Submitted via [www.regulations.gov](http://www.regulations.gov)*

**Re: Retirement Security Rule: Definition of an Investment Advice Fiduciary--RIN 1210-AC02**

To Whom It May Concern:

HUB International Limited (“HUB”) submits this letter in response to the Department of Labor’s (“Department”) request for comments relating to the above-referenced Retirement Security Rule. HUB appreciates the opportunity to provide comments on the proposal to update and redefine fiduciary investment advice under Section 3(21) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) and Prohibited Transaction Exemptions 77-4, 75-1, 80-83, 83-1 and 86-128.

HUB is headquartered in Chicago, Illinois, employs more than 17,000 throughout the United States and Canada, and is a leading full-service global insurance broker and financial services firm providing risk management, insurance, employee benefits, and retirement and wealth management products and services. Retirement & Private Wealth (“RPW”) is a division of HUB that focuses on advising ERISA plans and supplying wealth management services to individuals, businesses, and trusts. RPW advises through four affiliated registered investment advisors (each a “RIA”) to approximately 11,400 retirement plans with over \$138 Billion in retirement plan assets and 15,400 wealth management clients (a significant portion are Individual Retirement Accounts (“IRAs”)) with about \$11 Billion of assets under management. Many leaders within RPW are active in retirement industry trade associations, such as the American Retirement

Association, National Association of Plan Advisors, and the Retirement Advisory Council.<sup>1</sup> The comments set forth below are made by HUB's RPW division.<sup>2</sup>

## I. Summary

RPW believes that all employers who set up workplace retirement plans and receive advice by financial professionals regarding those plans should be afforded the high standard of care of a fiduciary. Although there have been great strides over recent years in advancing fiduciary standards to investors<sup>3</sup> and expanding small business retirement plan coverage,<sup>4</sup> there remains a gap for a fiduciary standard to be available for employers in many circumstances.<sup>5</sup> The Department attempts to close this gap by reforming the current five-part test of an investment advice fiduciary under Section 3(21) of ERISA to a new test, summarized as follows:

1. a provider provides investment **advice** or makes an investment **recommendation**,
2. to a **retirement investor**,
3. for a **fee or other compensation**, and
4. the advice or recommendation is made in the context of a professional relationship in which an investor would **reasonably expect** to receive such advice or recommendation that is in their best interest where:
  - a. the provider has **discretion** over investment decisions for the retirement investor, or
  - b. the provider makes investment recommendations to investors:
    - i. on a **regular basis as part of the provider's business**,
    - ii. the recommendation is provided under circumstances indicating that the recommendation is **based on the particular needs or individual circumstances** of the retirement investor, and

---

<sup>1</sup> Certain members of RPW assisted in the development of the American Retirement Association's comment letter, and RPW fully supports ARA's letter and comments.

<sup>2</sup> HUB also owns insurance marketing organizations serving as intermediaries as part of the distribution network for annuities between insurance companies and their agents.

<sup>3</sup> *E.g.*, the Securities and Exchange Commission's Regulation Best Interest ("Reg BI") for transactions or advice related to securities, and the Suitability in Annuity Transactions Model Regulation (#275) prepared by the National Association Insurance Commissioners ("NAIC Model Regulation") for the sales of annuities, which approximately 40 states have adopted in some form.

<sup>4</sup> Setting Every Community Up for Retirement Enhancement Act, 2023, Pub. L. No. 117-328, 136 Stat. 1963 (Dec. 29, 2022) ("SECURE 2.0").

<sup>5</sup> Reg BI and the NAIC Model Regulation only applies to retail investors, and employers of workplace plans are not defined as retail.

- iii. **may be relied upon** by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest, or
- c. the provider **states that they are acting as a fiduciary** when making investment recommendations.

RPW generally supports, except as stated below, the new definition of an investment advice fiduciary and the changes to the related prohibited transaction exemptions, as it broadens the scope of protected investment advice to include more interactions between financial professionals and plan sponsors. RPW also supports the new definition because it should capture more rollover conversations as advice and thus subject to ERISA. However, RPW is concerned about some of the Department's positions stated in the preamble that may have unintended consequences of limiting an investment advice fiduciary's ability to fully advise clients, putting plan sponsors in a position of breaching their fiduciary duties, and causing less services to be available to participants (particularly low balance accounts).

## II. **Plan Level**

### A. **RPW Supports One-Time Recommendations to Plan Sponsors as Fiduciary Advice**

There is a gap in current regulations where a one-time recommendation to a plan sponsor is not considered fiduciary advice. This gap is usually found in the small business market, where plan sponsors do not have the resources or financial expertise in constructing a retirement plan and investments for their employees. They rely on service providers or salespersons to provide recommendations and essential information about the plan and its investments. Whether these interactions occur once or on an ongoing basis should not make a difference whether the advice given is fiduciary or not. By applying the "regular basis" element to the business of the recommender instead of the relationship between the recommender and the retirement investor, more plan sponsors will be afforded fiduciary protection, which RPW supports.

### B. **Fiduciary Status Should Remain a Functional Test**

The conduct making someone a fiduciary traditionally has been a functional test. Either someone has maintained discretion to manage plan assets or has provided non-discretionary investment advice. The Department has preserved these actions in the new test, but it introduces a new definition for which all an advisor needs to do is acknowledge fiduciary status. RPW is not opposed to an advisor's transparency of being a fiduciary when the advisor actually is a fiduciary. However, RPW is opposed to making acknowledgement as an element to the test

for several reasons. First, fiduciaries already need to acknowledge their fiduciary status as part of meeting Prohibited Transaction Exemption 20-02. Making it as an added option under the fiduciary advice test seems unnecessary. Second, this new element opens the ability for actors to claim fiduciary status by mere statements or marketing. These actors could market or perform services not tied to the traditional fiduciary functions, making non-fiduciary services (such as financial education) subject to a fiduciary standard. If this is the Department's intent, then it should define the services that should be considered fiduciary actions, rather than an open-ended test based on verbal or written statements. Moreover, RPW is concerned that acknowledgement could be abused, giving bad actors an opportunity to win business under false pretenses.

It seems that the acknowledgement element was crafted to address the Department's concerns about advisors disclaiming fiduciary status based on facts and circumstances. However, a functional test *is based* on the facts and circumstances of the services provided by an advisor. The Department's solution around this apparent problem is to make any statement of being a fiduciary a fiduciary act. If disclaimers are the concern of the Department, it should provide guidance or FAQs addressing this problem. It seems that the new fiduciary acknowledgement element is more a solution seeking a problem than solving anything of substance. RPW recommends that the Department not add the fiduciary acknowledgement element to the new investment fiduciary test.

**C. Pre-Engagement Marketing of an Advisor or Service Should Not Be Considered a Fiduciary Act**

RPW appreciates the Department's comments in the preamble that a person will not become a fiduciary "merely by engaging in normal activity of marketing" or by "touting the quality of one's own advisory or investment management services." Advisors need the ability to promote their services without fear that such promotion could be considered fiduciary acts. However, there is concern that specific descriptions of investment products or services accompanying marketing discussions may be viewed as falling outside of the "hire me" discussion and considered fiduciary in nature. RPW asks the Department to clarify its statements, as the marketing of advisory services typically requires detailed descriptions of services, including proposed investment line-ups, managed account services, target date portfolios, etc. Moreover, plan sponsors typically request detailed descriptions of the services advisors provide as part of their own fiduciary due diligence requirements. The Department's position suggests that detailed conversations no longer can be part of the hiring process, which puts both sides in a quandary. Advisors will be restrained to provide only high-level marketing of their services,

which in turn leads to plan sponsors being unable to meet their fiduciary responsibilities of due diligence.

The Department should provide guidance that better delineates sales activity from fiduciary advice. RPW suggests viewing the line as between pre-engagement activity of an advisor or service and the engagement of the advisor or service. This distinction recognizes that until a plan sponsor accepts, and an advisor performs the agreed upon services, there is no fiduciary relationship of which a recommendation to a retirement investor for compensation occurs. This should clear up the ambiguity the preamble suggests for many situations:

- Advisors and plan sponsors can have free flowing, detailed conversations about their proposed relationships without triggering fiduciary status or causing fiduciary breach.
- Advisors already providing services to plans can answer Requests for Proposals without concerns, as the answers would be about future, continued services.
- Advisors already providing services to plans could discuss new services not part of the current relationship, as such new services are not part of the contract or priced in the current services.
- A mere referral to a third-party consultant, advisor, or service provider, even if the referral is compensable to the referrer, is not a fiduciary relationship.

The Department recognized that ultimately “the complete facts and circumstances surrounding” each communication must be considered when it comes to marketing of services. However, further explanation by the Department is necessary due to the ambiguities the preamble has created. RPW recommends that self-recommendations about services, as detailed as they may be, should not be fiduciary advice so long as they are not specifically agreed to by contract between the advisor and plan sponsor.

### **III. Rollovers and IRAs**

RPW generally supports that recommendations to roll over and to invest retirement plan assets leading to compensation to the recommender should be covered under ERISA. The proposed regulation should cover more service providers attempting to “capture” rollovers through calculated marketing programs and call centers regardless of the ultimate product or account rollover funds are placed. In other words, the regulations would level the financial services playing field and provide for product neutrality. The proposed regulations also are consistent with the fiduciary regulations under Reg BI and the NAIC Model Regulation regarding rollover recommendations; therefore, incorporating the proposed regulation into existing policies and

processes that comply with Reg BI and the NAIC Model Regulation should not be burdensome. However, clarification is needed about several items related to rollovers espoused by the Department.

**A. There is Room for Education about Rollovers Without Triggering Fiduciary Status**

The Department suggests that there is no room for educational discussions about rollovers by making statements that (1) you can't have a rollover discussion without discussing investments post-rollover, and (2) it is a breach of fiduciary duty if you don't discuss investments post-rollover. RPW disagrees with this position. There needs to be opportunities for advisors or service providers to educate plan participants about rollover options without being considered rollover advice. For example, many service providers will not take on low balance accounts directly, but they recognize that the participants of these accounts should receive services from others. Merely referring these participants to others, whether it be asset managers or IRA platforms with pre-defined investment menus – even if the referrer receives a referral fee – does not rise to the specificity of giving investment advice on how to invest in an IRA. Referrers should have the ability to suggest options so that plan participants potentially receive services and not have to face the market on their own.

**B. Once Assets are Rolled Over, ERISA No Longer Applies**

RPW supports the position that advice about investments as part of the initial recommendation to roll over is subject to ERISA. However, once the IRA is set up with the initially recommended investments, the character of the assets should not be considered plan assets governed by ERISA, and, therefore, the application of ERISA should no longer apply. It is difficult to understand how new recommendations that occur weeks, months or years after a rollover occurs would still be subject to ERISA. Any subsequent recommendations or ongoing investment management would be subject to other regulations traditionally governing such assets and accounts – such as the Internal Revenue Code, federal and state securities regulations, and/or state insurance regulations (annuities). These regulations will continue to protect investors, of which the Department should not have concern.

**IV. Robo-Advice**

RPW supports treating “robo-advice” as fiduciary investment advice when all elements of Section 2510.3-21 are met, and thus affording robo-advisors relief under PTE 2020-02. The form of the advice should not matter, whether given by a human being or a computer based on

algorithms. All fiduciary advice givers should be treated the same and afforded exemptive relief under PTE 2020-02.

The use of technology in providing investment advice has evolved significantly over the last 20-30 years. Such technologies range from tools used by investment advisors as *part of* their services to clients to the technologies themselves being (i) the decisionmaker based on algorithms and (ii) advice giver with their output for investors to use (i.e., robo-advice). Most robo-advisors are believed to be registered investment advisors with the SEC,<sup>6</sup> but some broker-dealers may also provide robo-advice.<sup>7</sup> There also is a growing industry of fintech and insurtech companies that could develop into the next-generation robo-advisors. A quick internet search suggests there are over 100 robo-advisors in the United States, where the assets under management are projected to grow to \$1.825 Trillion.<sup>8</sup>

One of the challenges in today's world is that recordkeepers, advisers and other service providers increasingly are using personal data to enhance the customer experience. While the customer experience certainly can be enriched using such data, issues arise when it is used to "improve" investment performance or to market investment ideas or strategies based on key data points unique to an individual. The output provided to clients (or output that can be retrieved by clients on a service provider's platform) generally to date has been characterized as education. However, there are companies building data sets and gathering detailed information about clients so that communications can be tailored. It is unclear whether these uniquely based communications can be considered educational or investment advice. One really doesn't know unless one is privy to the data about a client and the algorithms used. ARA encourages the Department to dig deeper into how client data is used and whether such use is deemed robo-advice, and to work with the SEC as it develops regulations concerning predictive data analysis.<sup>9</sup>

## **V. Conclusion**

RPW, a division of HUB, appreciates the opportunity to provide comments on the Department's broadening protection to more retirement plans that deserve the high standard of care under

---

<sup>6</sup> SEC Risk Alert: Observations from Examinations of Advisers that Provide Electronic Investment Advice, November 9, 2021.

<sup>7</sup> Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, 80 Fed. Reg. 53960 (proposed August 9, 2023).

<sup>8</sup> <https://www.statista.com/outlook/fmo/wealth-management/digital-investment/robo-advisors/united-states>

<sup>9</sup> See footnote 7.

RPW Comments on Retirement Security Rule

January 2, 2024

Page 8

ERISA, and to ensure product neutrality and a level playing field to individual retirement investors who desire rolling over their workplace plan assets to IRAs. We would welcome the opportunity to discuss these comments further with you. Please contact Jeff Gery, RPW's attorney at HUB, [jeff.gery@hubinternational.com](mailto:jeff.gery@hubinternational.com) with respect to any questions regarding the matters discussed herein. Thank you for your time and consideration.

Sincerely,

*Joseph F. DeNoyior*

Joseph F. DeNoyior

President

Retirement & Private Wealth

Cc: Jeffrey V. Gery, Assistant General Counsel